

REMARKS

This Amendment is submitted in reply to the final Office Action mailed on July 27, 2009. A Petition for a three month extension of time and a Request for Continued Examination (RCE) are submitted herewith this Amendment. The Commissioner is hereby authorized to charge \$810 for the RCE and \$1,110.00 for the Petition for a three month extension of time and any additional fees that may be required or credit any overpayment to Deposit Account No. 02-1818. If such a withdrawal is made, please indicate the Attorney Docket No. 3712036-00497 on the account statement.

Claims 1-16 are pending in this application. In the Office Action, Claims 1-16 are rejected under 35 U.S.C. §112, second paragraph. Claims 1-16 are also rejected under 35 U.S.C. §103 (a). In response, Claims 1-2, 4-9 and 16 have been amended and Claim 10 has been canceled without prejudice or disclaimer. The amendments do not add new matter. In view of the amendments and/or for the reasons set forth below, Applicants respectfully submit that the rejections should be reconsidered and withdrawn.

In the Office Action, Claims 1-16 are rejected under 35 U.S.C. §112, second paragraph as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Regarding Claims 1 and 16, the Patent Office alleges that the limitation "passing the container having the frozen dessert through a freezing tunnel at a temperature that allows the frozen dessert to form a pasty state" is not clear because it is not clear how the "already frozen" product will form a pasty state. See, Office Action, page 3, lines 1-7.

In response, Applicants respectfully submit that the skilled artisan would immediately appreciate the meaning of the phrase "frozen dessert," which is a commonly used term of art. For example, in the art of confections, the term "frozen dessert" implies a dessert that is designed to be stored and consumed in the "frozen" form (e.g., ice-cream or milkshakes) as opposed to a dessert that is designed to be stored and consumed at ambient or heated temperatures (e.g., pies, cakes, hot chocolates, etc). Accordingly, the indicator "frozen" immediately preceding the term "dessert," would be immediately interpreted by the skilled artisan as referring to a dessert that is designed to be stored and consumed in frozen form, not necessarily a dessert that is frozen solid. Further, as discussed in the specification, depending on the degree of expansion of the "frozen dessert," the dessert may be ejected from a receptacle in the form of, for example, compact pastes or foams. See, Preliminary Amendment, page 4, lines 20-25. As such, the specification

makes clear that a "frozen dessert" need not be frozen solid and may, in fact be in the form of a compact paste, a paste or a foam.

With respect to Claim 2, the Patent Office alleges that the recitation of "good dissolution of the expansion gas" is subjective and that the claim "does not provide any recitation of the particular result that is linked with 'good dissolution' (i.e. wherein the dissolution is sufficient to provide a consistently expanded product)." See, Office Action, page 3, lines 8-9; page 10, lines 5-18.

In response, Applicants have amended Claim 2 to recite, in part, a method comprising treating an ice-cream mix in a freezer, under temperature and pressure conditions promoting sufficient dissolution of the expansion gas in the ice-cream mix so as to provide an expanded product. The amendment does not add new matter and is supported in the Preliminary Amendment at, for example, page 4, line 26-page 6, line 7; page 6, lines 17-20. Applicants respectfully submit that the skilled artisan would immediately appreciate that a specific numerical degree of dissolution is not required by the present claims. Instead, the skilled artisan would immediately appreciate that the expansion gas must simply be sufficiently dissolved within the product so as to provide sufficient expansion of the product. In this regard, it would be appreciated that partial dissolution or unequal dissolution may not provide sufficient or good dissolution to provide a consistently expanded product.

For at least the reasons set forth above, Applicants respectfully submit that Claims 1-16 fully comply with the requirements of 35 U.S.C. §112, second paragraph.

Accordingly, Applicants respectfully request that the rejection of Claims 1-16 under 35 U.S.C. §112, second paragraph, be reconsidered and withdrawn.

In the Office Action, Claims 1-4, 9, 12 and 14-16 are rejected under 35 U.S.C. §103(a) as being unpatentable over WO 9730600 to Riviere et al., wherein U.S. Patent No. 6,558,729 to Riviere et al. ("*Riviere*") is relied on as an English translation of WO 9730600; U.S. Patent no. 3,677,443 to Smadar et al. ("*Smadar*"); U.S. Patent No. 2,294,172 to Getz ("*Getz*"); U.S. Patent No. 4,346,120 to Morley et al. ("*Morley*"); U.S. Patent No. 5,698,247 to Hall ("*Hall*"); U.S. Patent No. 6,379,736 to Destephano ("*Destephano*"); and U.S. Patent No. 5,633,029 to Cox et al. ("*Cox*"). Applicants respectfully disagree with and traverse this rejections for at least the reasons set forth below.

Independent Claims 1 and 16 have been amended to recite, in part, methods comprising placing a frozen dessert in a first compartment of a rigid receptacle equipped with a dispensing member and a piston that divides the receptacle into the first compartment and a second compartment, then, after having put the dispensing member in a closed position, pressurizing the rigid receptacle by injecting a propellant gas into the second compartment of the rigid receptacle to a pressure great enough to ensure dispensing, given the consistency of the frozen dessert to be dispensed and characteristics of the dispensing member, the method comprising using a propellant gas in the second compartment which is virtually insoluble in the product to be dispensed, and using an expansion gas in the first compartment which is different from the propellant gas and highly soluble in the frozen dessert to be dispensed in order to expand the frozen dessert when it is dispensed. The amendments as discussed above are fully supported in the Preliminary Amendment at, for example, page 6, lines 21-26.

Applicants have found that it is possible to package a thick but malleable frozen dessert in a pressurized receptacle with a high enough pressure given the viscosity of the product. Applicants have also found that it is also possible to choose the degree to which the product is expanded at the output of the pressurized receptacle independently of the pressure required for propulsion of the product from the receptacle and of the speed at which the product comes out of the receptacle. See, Preliminary Amendment, page 4, lines 13-19. These advantages are achieved, in part, by providing two different gases for dispensing, the product, one of which has the propulsion function and the other the expansion function. Each gas is contained in a separate chamber of a container. The propellant gas is virtually insoluble in the product to be dispensed when in the liquid state while the expansion gas is highly soluble in the said liquid product. The expansion of the dispensed product will then be dependent on the amount and on the solubility of the expansion gas introduced into the receptacle, while the ejection of the product will depend on the pressure of the propellant gas introduced into the receptacle. In contrast, Applicants respectfully submit that the cited references fails to disclose each and every element of the present claims.

Riviere, Smadar, Getz, Morley, Hall, Destephano, and Cox all fail to disclose or suggest methods comprising placing a frozen dessert in a first compartment of a rigid receptacle equipped with a dispensing member and a piston that divides the receptacle into the first compartment and a second compartment, then, after having put the dispensing member in a

closed position, pressurizing the rigid receptacle by injecting a propellant gas into the second compartment of the rigid receptacle to a pressure great enough to ensure dispensing, given the consistency of the frozen dessert to be dispensed and characteristics of the dispensing member, the method comprising using a propellant gas in the second compartment which is virtually insoluble in the product to be dispensed, and using an expansion gas in the first compartment which is different from the propellant gas and highly soluble in the frozen dessert to be dispensed in order to expand the frozen dessert when it is dispensed as required, in part, by independent Claims 1 and 16.

Instead, *Riviere* is entirely direct toward a frozen dessert that is spoonable at freezing temperatures without the necessity of the product being expanded by the incorporation of gas or passing through a nozzle under pressure into a container in which the product is packaged under pressure. See, *Riviere*, Abstract; column 3, lines 32-38. At no place in the disclosure does *Riviere* suggest methods for packaging a frozen dessert in a rigid receptacle having a piston dividing the receptacle into first and second compartments wherein the first compartment comprises an expansion gas and the second compartment comprises the propellant gas.

Smadar is entirely directed toward a non-dairy food product having a texture and eating characteristics of soft-serve ice cream that can be dispensed from a self-refrigerating dispenser containing a refrigerant under pressure and in a liquid state. See, *Smadar*, Abstract; column 3, lines 61-69. *Smadar* discloses an apparatus for dispensing frozen comestibles having a dispensing unit 10 that is divided into two chambers – a lower chamber 26 and an upper chamber 28. The lower chamber serves as a housing for a bag 12 containing a liquid product, the bag is surrounded by a compressed liquid refrigerant. The lower chamber is connected to the upper chamber by a valve system allowing the liquid refrigerant to vent from the lower chamber into the upper chamber and to expand, thereby cooling the product which is at the same time led from the bag 12 toward a dispensing nozzle through a conduit. The compressed liquid refrigerant squeezes the product from the bag into the conduit and serves as a propellant. Whether the propellant is soluble or not does not matter since it will never be in contact with the product and only acts on the bag as a propellant and on the conduit as a refrigerant.

Further, *Smadar* merely suggests the alternate use of edible propellant which may be added to the product bag and which will not only serve as a propellant but also aerate the mix. However, it is expressly mentioned that “where a propellant gas is incorporated within the

product, additional refrigerant pressure for the purpose of dispensing the product is unnecessary.” See, *Smadar*, column 4, lines 62-64. Thus, *Smadar* does not disclose the use of an insoluble propellant gas and a soluble expansion gas, let alone the use of the gases in separate compartments of a receptacle. Instead, *Smadar* merely discloses the use of one soluble gas for propelling and expansion or the use of a gas for refrigerating and dispensing. See, *Smadar*, column 4, lines 47-64. Accordingly, at no place in the disclosure does *Smadar* disclose or suggest methods for packaging a frozen dessert in a rigid receptacle having a piston dividing the receptacle into first and second compartments wherein the first compartment comprises an expansion gas and the second compartment comprises the propellant gas.

Getz is entirely directed toward an aerated food product containing cream and having more than twice the volume of the material before aeration. See, *Getz*, column 1, lines 1-24. *Morely* is entirely directed toward frozen food products that emulate the features of soft serve ice cream but at such lower temperatures as to be suitable for prolonged storage in store and home freezers. See, *Morely*, column 1, lines 5-11. At no place in the disclosures do either *Getz* or *Morely* disclose or suggest methods for packaging a frozen dessert in a rigid receptacle having a piston dividing the receptacle into first and second compartments wherein the first compartment comprises an expansion gas and the second compartment comprises the propellant gas.

Further, newly cited references *Hall*, *Destephano* and *Cox* fail to remedy the deficiencies of the previously cited references discussed above. For example, *Hall* is entirely directed to process for the manufacture of a frozen spoonable water-ice comprising producing ice flakes, grinding the ice flakes into spherical granules, mixing the granules with a flavored slurry and packaging the mixture. See, *Hall*, Abstract. *Destephano* is entirely directed toward a dairy-based gelato composition that includes an amount of solids, a sugar source, and a fat source and retains a texture characteristic of freshly-made gelato. See, *Destephano*, Abstract. *Cox* is entirely directed to a suspension of very small ice crystals in a sugar solution that involves cooling the solution to a temperature from just about the metastable limit temperature of the solution to just above the melting point of the solution. See, *Cox*, Abstract. At no place in the disclosures do *Hall*, *Destephano* or *Cox* disclose or suggest methods for packaging a frozen dessert in a rigid receptacle having a piston dividing the receptacle into first and second compartments wherein the first compartment comprises an expansion gas and the second compartment comprises the propellant gas.

Additionally, FR 2233843 to Rio ("*Rio*"), EP 0509967 to Ciabatti ("*Ciabatti*"), EP 0136104 to Scheindel ("*Scheindel*") and EP 1061006 to Clauwert ("*Clauwert*") also fail to remedy the deficiencies of the above-cited references. For example, *Rio* is entirely directed to the use of a container that employs a flexible pouch within a container. *Ciabatti* was cited by the Patent Office solely for the disclosure of the use of compressed air as a propellant. *Scheindel* was cited by the Patent Office solely for the disclosure of the use of a propellant such as air that may be separated from a compartment of a container. *Clauwert* was cited by the Patent Office solely for the disclosure of containers having a first compartment with a food source that is aerated upon dispensing. See, Non-Final Office Action dated December 11, 2008, pages 12-14.

Accordingly, *Rio*, *Ciabatti*, *Scheindel* and *Clauwert* also fail to disclose or suggest methods for packaging a frozen dessert in a rigid receptacle having a piston dividing the receptacle into first and second compartments wherein the first compartment comprises an expansion gas and the second compartment comprises the propellant gas. For at least the reasons discussed above, Applicants respectfully submit that the cited references fail to disclose each and every element of the present claims.

Accordingly, Applicants respectfully request that the rejection of Claims 1-4, 9, 12 and 14-16 under 35 U.S.C. §103(a) be reconsidered and withdrawn.

In the Office Action, Claims 5 and 7 are rejected under 35 U.S.C. §103(a) as being unpatentable over the *Riviere*, *Smadar*, *Getz*, *Morley*, *Hall*, *Destephano*, and *Cox* and further in view of EP 0136104 to Scheindel ("*Scheindel*") and U.S. Patent No. 3,710,538 to Lowy et al. ("*Lowy*"); Claim 6 is rejected under 35 U.S.C. §103(a) as being unpatentable over the *Riviere*, *Smadar*, *Getz*, *Morley*, *Hall*, *Destephano*, and *Cox* and further in view of U.S. Patent No. 4,967,931 to DeVries ("*DeVries*") as further evidenced by "Ice Cream and Frozen Desserts" to Stogo ("*Stogo*"); Claim 8 is rejected under 35 U.S.C. §103(a) as being unpatentable over *Riviere*, *Smadar*, *Getz*, *Morley*, *Hall*, *Destephano*, and *Cox* and further in view of U.S. Patent No. 5,277,336 to Youel ("*Youel*") and *Scheindel*, and U.S. Patent No. 5,799,469 to Obrist ("*Obrist*"); EP 1013566 to Mekata ("*Mekata*"), U.S. Patent No. 3,225,967 to Heimgartner ("*Heimgartner*"), and FR 2829748 to Riviere ("*Riviere II*"); Claims 10 and 11 are rejected under 35 U.S.C. §103(a) as being unpatentable over *Riviere*, *Smadar*, *Getz*, *Morley*, *Hall*, *Destephano*, and *Cox* and further in view of FR 2233843 to Rio ("*Rio*"), EP 0509967 to Ciabatti ("*Ciabatti*"), *Scheindel* and EP 1061006 to Clauwert ("*Clauwert*"); Claim 13 is rejected under 35 U.S.C.

§103(a) as being unpatentable over *Riviere, Smadar, Getz, Morley, Hall, Destephano, and Cox* and further in view of GB 1232929 to E.I. Du Pont de Nemours and Co. ("*Du Pont*") and U.S. Patent No. 4,659,575 to Fiedler ("*Fiedler*"). Applicants respectfully submit that the patentability of independent Claim 1 as previously discussed renders moot the obviousness rejection of Claims 5-8, 10-11, and 13 that depend from Claim 1. In this regard, the cited art fails to teach or suggest the elements of Claims 5-8, 10-11, and 13 in combination with the novel elements of Claim 1.

For the foregoing reasons, Applicants respectfully request reconsideration of the above-identified patent application and earnestly solicit an early allowance of same. In the event there remains any impediment to allowance of the claims that could be clarified in a telephonic interview, the Examiner is respectfully requested to initiate such an interview with the undersigned.

Respectfully submitted,

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